93-698

No. _____

Supreme Court, U.S.
FILED
NOV 3 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ALFRED M. ADAMS,

Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS L. TOONE
BEER & TOONE, P.C.
76 E. Mitchell Drive
Phoenix, Arizona 85012
(602) 263-0900
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTION PRESENTED

Whether Circuit Courts of Appeal lack jurisdiction to review the FAA Administrator's decisions to not renew designations of private persons to act as delegates of the FAA for purposes of examination, inspection and testing.

PARTIES INVOLVED

All of the parties to the appeal to the United States Court of Appeals for the Ninth Circuit are listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES INVOLVED i

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

Page

CASES:

Keating v. FAA, 610 F.2d 611 (9th Cir. 1979) 10

Rombough v. Federal Aviation Administration, 594 F.2d 893 (2d Cir. 1979) 9

Suburban O'Hare Com'n v. Dole, 787 F.2d 186 (7th Cir. 1986) 9, 10

Western P.R. Co. v. Habermeyer, 382 F.2d 1003 (9th Cir. 1967), cert. denied, 390 U.S. 980, 19 L.Ed.2d 1277, 88 S.Ct. 1100 11

OTHER AUTHORITIES:

14 C.F.R. § 183.15(d) (1993) 3

FAA Order 8710.3A 7

FAA Order 8710.3A (1984) 4

FAA Order 8710.3A, paragraph 31(c) 7

5 U.S.C. § 701(a) (1988) 5

5 U.S.C. § 701, *et seq.* 9

28 U.S.C. § 1254(1) 2

49 U.S.C. App. § 1355(a) (1988) 2, 7

49 U.S.C. App. § 1486(a) (1988) 5, 6, 8, 9, 11

49 U.S.C. App. § 1486(f) 2

No. _____

In The

Supreme Court of the United States

October Term, 1993

ALFRED M. ADAMS,

Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Alfred M. Adams, petitioner below, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) designated for publication has not yet been reported. The decision of the Federal Aviation Administration (App. B)

for which review was sought was sent directly to petitioner and is not subject to being reported.

JURISDICTION

The opinion of the court of appeals (App. A) was filed August 12, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. App. § 1486(f).

STATUTES AND REGULATIONS INVOLVED

1. The Federal Aviation Act provides:

> In exercising the powers and duties vested in him by this chapter, the Secretary of Transportation may, subject to such regulations, supervision, and review as he may prescribe, delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under subchapter VI of this chapter, and (2) the issuance of such certificates in accordance with standards established by him. The Secretary of Transportation may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate.

49 U.S.C. App. § 1355(a) (1988).

2. The FAA regulation relating to termination of designations provides:

> (d) A designation made under this subpart terminates –
>
> (1) Upon the written request of the representative;
>
> (2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;
>
> (3) Upon the representative being separated from the employment of the employer who recommended him for certification;
>
> (4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;
>
> (5) Upon the assistance of the representative being no longer needed by the administrator; or
>
> (6) For any reason the Administrator considers appropriate.

14 C.F.R. § 183.15(d) (1993).

3. The FAA Order issued by the Agency to advise FAA designees of their rights and duties provides in part:

> 31. *CANCELLATION.* A designation may be cancelled by the designating field office on the basis of any of the following:
>
> a. *There is no longer a need* for the examiner's services.

> b. *Continued unsatisfactory performance* in any phase of examiner duties or responsibilities, including inability to accept or carry out designating office instructions.
>
> c. *Any action(s) by the examiner* which may reflect discredit on the FAA, such as proof and adjudicated cases of malpractice or fraudulent use of the designation.
>
> d. *Demonstrated inability of the examiner* to work harmoniously with personnel of the district office or with the public which is deemed incapable of being corrected.
>
> e. *Confirmation of evidence* that the examiner's general or professional qualifications and requirements were, in fact, not met at the time of the original designation or, are not met at anytime thereafter.
>
> f. *The inability of an examiner to demonstrate* satisfactory performance during a knowledge and skill evaluation (see paragraph 28) or during a recurrent examiner or job function course.
>
> g. *The inability of an examiner to demonstrate* qualifications for any certificate or rating held or, for which the examiner holds a designation (such as certificate action under Section 609 of the FA Act of 1958 as amended).

FAA Order 8710.3A (1984).

4. With respect to the reviewability of FAA decisions, the Federal Aviation Act provides:

> Any order, affirmative or negative, issued by the Board or Secretary of Transportation

> under this chapter. . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after entry of such order, by a person disclosing a substantial interest in such order.

49 U.S.C. App. § 1486(a) (1988).

5. The Administrative Procedure Act ("APA") provides:

> This chapter applies, according to the provisions thereof, except to the extent that –
>
> (1) Statutes preclude judicial review; or
>
> (2) Agency action is committed to agency discretion by law.

5 U.S.C. § 701(a) (1988).

STATEMENT OF THE CASE

Petitioner Alfred M. Adams was a full-time employee of the Federal Aviation Administration for 19 years until his retirement in September, 1989. Mr. Adams' duties with the FAA included Aviation Safety Inspector, FAA Academy Flight Instructor, and Supervisory Aviation Safety Inspector. After his retirement, Mr. Adams applied and was given temporary approval to serve as a designee of the FAA to examine persons seeking private, commercial, flight instructor, and airline transport pilot certificates, to check those seeking instrument ratings, and to examine those seeking type ratings in Sabreliner jet aircraft. Temporary approval was obtained in July, 1990, and

final approval for Mr. Adams' designation as an FAA pilot examiner was obtained in October, 1990. By letter dated October 21, 1991, the FAA notified petitioner of its proposal not to renew petitioner's FAA Pilot Examiner Designation when it expired on October 31, 1991. This proposal was made by the Acting Manager, Flight Standards Division, Western-Pacific Region of the FAA. Petitioner filed responsive materials and requested an opportunity to make an oral response to the proposal. A hearing to receive oral testimony before Richard R. Merriman, Acting Manager, Flight Standards Division, was held on November 15, 1991. By letter dated December 13, 1991, Mr. Merriman issued a formal decision not to renew the Pilot Examiner Designation and advised that further administrative review of the decision could be had from Mr. Thomas C. Accardi, Director, FAA Flight Standards Service, in Washington, D.C., within 10 days of the decision. On December 16, 1991, petitioner requested further review from Mr. Accardi. On January 27, 1992, Mr. Accardi issued his final decision not to renew petitioner's Pilot Examiner designation, and advised of the right to file a Petition for Review in the United States Court of Appeals within 60 days of the date of mailing of the decision. (App. B.)

Pursuant to the FAA's directions as to reviewability, and pursuant to 49 U.S.C. App. § 1486(a) (1988), petitioner filed a Petition for Review (App. C) with the United States Court of Appeals in and for the Ninth Circuit on February 11, 1992. By Opinion filed August 12, 1993 (App. A), the Court of Appeals dismissed the Petition for Review for the reason that it lacked jurisdiction

to review the FAA Administrator's decision because it was a decision committed to agency discretion by law.

REASONS FOR GRANTING THE WRIT

Petitioner Alfred M. Adams was serving as a designee of the Federal Aviation Administration for purposes of examining and approving persons seeking to acquire certain pilot certificates and ratings. This designation was made under authority of the Federal Aviation Act, 49 U.S.C. App. § 1355(a) (1988). In addition to designating private persons to serve as various categories of pilot examiners, the FAA also designates, pursuant to the same statutory authority, private persons to serve as airman medical examiners, mechanic examiners, airworthiness representatives, and manufacturer inspection representatives. Upon petitioner's best information and belief, there are some 14,000 persons currently serving as designees exercising jurisdiction of the FAA in the various categories. For the most part, these private persons charge fees for their services and substantially alter their lifestyles to accommodate the performance of their duties associated with their designations. Their qualifications to serve, procedures to follow, standards of conduct, and duration of service are set forth in various rules and regulations issued by the FAA. In petitioner's case, designated pilot examiners' rules and regulations of conduct are set forth in FAA Order 8710.3A.

In making its decision not to renew Adams' designation as a pilot examiner, the FAA specifically relied upon FAA Order 8710.3A, paragraph 31(c), which provides that

cancellation is appropriate where there are actions on the part of the examiner which may reflect a discredit on the FAA, such as proof and adjudicated cases of malpractice or fraudulent use of the designation.

The final Order of the FAA for which judicial review was sought in the Ninth Circuit Court of Appeals specifically advised petitioner that:

> Should you wish to contest this decision, your legal remedy is to file a petition for review in the United States Court of Appeals within sixty days of the date of mailing of this final decision.

App. B at p. 2.

A judicial review of the Administrator's decision is statutorily guaranteed in 49 U.S.C. App. § 1486(a) (1988), which specifies that *"any order,* affirmative or negative, issued by the Board of Secretary of Transportation under this chapter shall be subject to review by the courts of appeals of the United States."

The decision of the Ninth Circuit Court of Appeals that it lacks jurisdiction to review the decision of the FAA Administrator is in direct conflict with the statutory right to judicial review set forth in the Federal Aviation Act. This decision adversely affects the rights of the approximately 14,000 FAA designees in that they are prevented from seeking judicial review of FAA decisions, no matter whether the decisions are based upon substantial evidence or upon unconstitutional discriminations. These designees are doctors, engineers, professional pilots, and others whose rights are substantially impaired by the decision, and therefore the question is of significant

importance to a vital segment of our national transportation system.

Further, the decision of the Ninth Circuit Court of Appeals is in direct conflict with decisions from the Second and Seventh Circuit Courts of Appeal. The "authority" upon which the Ninth Circuit relies is the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* In its Opinion, App. A-4, the court (without statutory or case authority) determines that the general provisions of the APA override the specific language of the Federal Aviation Act requiring judicial review of FAA orders (49 U.S.C., App. § 1486(a) (1988)). Although the Ninth Circuit cites no legal authority for this interpretation, there is legal authority directly to the contrary.

In *Rombough v. Federal Aviation Administration,* 594 F.2d 893 (2d Cir. 1979), the court was considering reviewability of an FAA decision in regard to whether a pilot should be exempt from the "over 60" rule, and held:

> Moreover, § 1006(a) of the Aviation Act, 49 U.S.C. § 1486(a), specifically provides that '[a]ny order' of the Administrator, 'affirmative or negative,' is subject to judicial review. *This specific review provision must take precedence over the general provisions of the Administrative Procedure Act.* (Emphasis supplied.)

594 F.2d at 895.

The same issue was later considered by the Seventh Circuit Court of Appeals in *Suburban O'Hare Com'n v. Dole,* 787 F.2d 186 (7th Cir. 1986), where it held:

> 49 U.S.C. § 1486(d) declares that the courts of appeals shall have exclusive jurisdiction to

> affirm or set aside an order of the FAA issued pursuant to this section. Thus, if the FAA order approving the ALP was, in fact, made pursuant to Section 1486 it is clear that exclusive jurisdiction to review that order rests with this court. (Citations omitted.)

787 F.2d at 192.

The *O'Hare* court considered the applicability of the Administrative Procedures Act to FAA orders issued under Section 1486:

> The obvious difficulty with the rationale of those cases reviewing informal FAA decisions under the 'arbitrary and capricious' or 'abuse of discretion' standards is that *the APA is clearly not applicable to FAA action under Section 1486.* Both *Tiger International,* 554 F.2d at 935-36, and *Rombough,* 594 F.2d at 896, acknowledge that their reliance on *Camp* and the APA is by analogy only. But the argument by analogy is neither persuasive nor necessary where, as here, Congress has created a special review provision specifically designed to address precisely the type of case before the court. *The specific review provisions of Section 1486 take precedence over the general provisions of the APA. Rombough,* 594 F.2d at 895-96. (Emphasis supplied.)

787 F.2d at 194.

The Ninth Circuit itself had held that an FAA order denying a pilot an "over 60" exemption was subject to judicial review, and stated that as a general rule:

> Judicial review is precluded only in rare instances when statutes are drawn so broadly that, in a given case, there is no law to apply.

Keating v. FAA, 610 F.2d 611 (9th Cir. 1979).

Petitioner contends that the Ninth Circuit has misconstrued the scope and purpose of the Administrative Procedure Act. As the court itself has stated, the purpose of the APA is to grant judicial review of a final agency action by an aggrieved person unless there is a persuasive reason to believe the purpose of Congress was to restrict access to judicial review. *Western P.R. Co. v. Habermeyer*, 382 F.2d 1003 (9th Cir. 1967), cert. denied, 390 U.S. 980, 19 L.Ed.2d 1277, 88 S.Ct. 1100.

What is completely ironic about the FAA's position is that the Order appealed from (App. B) *itself* advised the petitioner that his legal remedy " . . . is to file a petition for review in the United States Court of Appeals. . . . " Only after the appeal was filed did the FAA raise the issue that the court of appeals had no jurisdiction to review its decision, alleging that the APA superseded the Federal Aviation Act.

The APA provides a statutory procedural scheme permitting judicial review of administrative orders by federal district courts. However, the Federal Aviation Act specifically granted an express right of reviewability of an FAA final order directly to the circuit courts of appeal. This absolute right of review (49 U.S.C. App. § 1486(a)) says nothing about nonreviewability of "agency action committed to agency discretion," nor does it indicate that the APA should override its provisions.

In this case, Petitioner contends that the FAA violated its own rules and regulations and issued an order not supported by substantial evidence. FAA designees devote substantial time and effort to the performance of

their duties, and judicial review of FAA action is important to ensure their fair treatment. Preclusion of FAA orders from judicial review was not the intent of the Federal Aviation Act, nor can this be considered one of those "rare instances" warranting such a harsh result.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals has taken away the rights of approximately 14,000 persons to seek judicial review of orders that the FAA may issue relative to cancellation of their designations, and the matter is therefore of substantial national importance to a vital segment to our transportation industry. Additionally, the decision of the Ninth Circuit directly conflicts with opinions from the Second and Seventh Circuits, such that this court should issue a decision to resolve the conflict. For these and other considerations expressed herein, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS L. TOONE
BEER & TOONE, P.C.
76 E. Mitchell Drive
Phoenix, Arizona 85012
602/263-0900
Attorneys for Petitioner

November 1993

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED M. ADAMS, *Petitioner,* v. FEDERAL AVIATION ADMINISTRATION, *Respondent.*	No. 92-70089 FAA No. 8710.3A OPINION

Petition to Review a Decision of the
Federal Aviation Administration

Argued and Submitted
July 12, 1993 – San Francisco, California

Filed August 12, 1993

Before: Herbert Y. C. Choy, Procter Hug, Jr., and Edward Leavy, Circuit Judges.

Per Curiam

SUMMARY

Administrative Law/Judicial Review/Government Law

The court of appeals dismissed a petition for review of a decision of the Federal Aviation Administration. The court held that it lacked jurisdiction to review a decision of the FAA not to renew a petitioner's Pilot Examiner

Designation because the Federal Aviation Act committed the decision to agency discretion by law.

Petitioner Alfred Adams' examiner designation was not renewed by the FAA. Adams appealed.

[1] The Act provides that the Secretary of Transportation may rescind any examiner delegation at any time for any reason deemed appropriate. [2] Although the Act grants the court of appeals jurisdiction to review orders of the Secretary, the Administrative Procedure Act restricts such review when the agency's action is committed by law to agency discretion, [3] which was the case here, since the act did not provide a meaningful standard against which the appellate court could judge the agency's exercise of discretion.

COUNSEL

Thomas L. Toone, Beer, Toone & Ryan, Phoenix, Arizona, for the petitioner.

Jerome P. Jones, Jr., Federal Aviation Administration, Washington, D.C., for the respondent.

OPINION

PER CURIAM:

Appellant Alfred Adams seeks direct review of Federal Aviation Administration ("FAA") Flight Standards Service Director Thomas Accardi's decision not to renew his Pilot Examiner Designation. We conclude that we lack jurisdiction to review the FAA administrator's decision. Accordingly, Adams' petition is dismissed.

[1] Adams was designated as a Pilot Examiner, pursuant to the Federal Aviation ("FA") Act. *See* 49 U.S.C. App. § 1355(a) (1988). The FA Act also authorizes the rescission of any such designation. The FA Act provides, in pertinent part:

> In exercising the powers and duties vested in him by this chapter, the Secretary of Transportation may, subject to such regulations, supervision, and review as he may prescribe, delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under subchapter VI of this chapter, and (2) the issuance of such certificates in accordance with standards established by him. *The Secretary of Transportation* may establish the maximum fees which such private persons may charge for their services and *may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate.*

49 U.S.C. § 1355(a) (1988) (emphasis added).

[2] Although the FA Act grants this court jurisdiction to review orders issued by the Board or Secretary of Transportation,[1] we also must consider the restrictions

---

[1] The Act provides in relevant part:

> Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, . . . , shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon

placed on the court's authority to review such orders articulated in the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The APA confers a general cause of action upon any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702 (1988), but withdraws that cause of action to the extent the relevant statute "preclude[s] judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1) and (2) (1988). Appellee asserts that both of the exceptions to judicial review in section 701(a) apply to this case.

[3] We conclude that the FA Act commits the FAA administrator's decision to agency discretion by law. Agency action is unreviewable when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985); *County of Esmeralda v. Dep't of Energy,* 925 F.2d 1216, 1218 (9th Cir. 1991); *see also Keating v. Federal Aviation Admin.,* 610 F.2d 611, 612 (9th Cir. 1979). "Such a determination is statute specific and relates to the language of the statute and whether the general purposes of the statute would be endangered by judicial review." *Esmeralda,* 925 F.2d at 1218 (citing *Webster v. Doe,* 486 U.S. 592, 600-01 (1988)).

Appellee correctly points out that the FA Act does not set out specific factors for an FAA administrator to consider in determining whether to rescind a delegation

---

> petition, filed within sixty days after entry of such order, by any person disclosing a substantial interest in such order.

49 U.S.C. App. § 1486(a) (1988).

of power made under 49 U.S.C. App. § 1355(a). It states simply that "[t]he Secretary . . . may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate." The statement in the legislative history of the Civil Aeronautics Act that "permit[s] the Secretary and the Administrator to terminate [a delegatee's] authority whenever they deem it advisable," H.R. Rep. No. 3047, 81st Cong., 2nd Sess. (1950), lends support to appellee's position. *See Esmeralda,* 925 F.2d at 1218-19 (citing *Webster,* 486 U.S. at 600).

Although the chapter of the Act relevant to this case provides for judicial review of any order issued by the Board or Secretary of Transportation, *see* 49 U.S.C. App. § 1486(a) (1988), there is no judicially-manageable standard by which we may review the FAA administrator's decision not to renew Adams' designation as a Pilot Examiner. *Compare Webster,* 486 U.S. at 600-01 (judicial review precluded) and *Chaney,* 470 U.S. at 830, 835 (same) *with Esmeralda,* 925 F.2d at 1219 (judicial review not precluded). Both the FA Act and the applicable FAA administrative regulation commit the decision to terminate a Pilot Examiner Designation entirely to the FAA administrator's discretion. *See* 49 U.S.C. App. § 1355(a) (1988); 14 C.F.R. § 183.15 (1993).[2]

---

[2] The regulation provides in relevant part:

(d) A designation made under this subpart terminates –

(1) Upon the written request of the representative;

Therefore, we hold that we lack jurisdiction to review the FAA administrator's decision not to renew Adams' Pilot Examiner Designation.

Adams' petition is DISMISSED.

---

(2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;

(3) Upon the representative being separated form the employment of the employer who recommended him for certification;

(4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;

(5) Upon the assistance of the representative being no longer needed by the Administrator; or

(6) *For any reason the Administrator considers appropriate.*

14 C.F.R. § 183.15(d) (1993) (emphasis added).

APPENDIX B

U.S. Department
of Transportation

**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

JAN 27 1992

Mr. Thomas L. Toone
Beer, Toone & Ryan, P.C.
76 East Mitchell
Phoenix, Arizona 85012

Dear Mr. Toone:

In response to you letter of December 16, 1991, I have conducted a review of the action taken by Mr. Richard Merriman, Acting Manager, Flight Standards Division, Western-Pacific Region, with respect to the Federal Aviation Administration (FAA) Pilot Examiner Designation that had been issued to your client, Mr. Alfred M. Adams. By his letter of December 13, 1991, Mr. Merriman declined to renew Mr. Adams' designation as a pilot examiner, which designation expired by its own terms on October 31, 1991.

I have reviewed the investigative materials which formed the basis for Mr. Merriman's decision not to renew your client's designation. It reveals substantial evidence of misconduct on Mr. Adams' part during the time he was employed with the FAA as a Unit Supervisor at the Scottsdale Flight Standards District Office (FSDO). These acts of misconduct include: (1) operating a personal computer business, including the selling and servicing of computer hardware and software, while on FAA duty

time and on FAA property; (2) utilizing the FSDO premises during nonduty hours to conduct computer training classes for both FAA employees and private citizens; (3) selling computer products and services to both subordinate FAA employees and aviation interests subject to his regulatory responsibility; and (4) exerting improper influence upon such subordinate FAA employees and aviation interests to purchase computer products and services and/or giving preferential treatment to those FAA employees and aviation interests who purchased his computer products or services.

I have also reviewed the exculpatory statement offered by Mr. Adams at the time of your November 26, 1991, meeting with Mr. Merriman. Notwithstanding these exculpatory statements (which I do not find to be persuasive), the evidence reveals, at a minimum, a clear conflict of interest on Mr. Adams' part and an appearance of impropriety which reflects discredit upon the FAA. Such conduct constitutes grounds, under 14 CFR § 183.15, and FAA Order 8710.3A, paragraph 31, for terminating or cancelling a designation, and as such, for not renewing Mr. Adams' designation.

I have also reviewed the information and arguments set forth in your letters of October 25, 28, and 31, 1991, which I find to be similarly unpersuasive. While you are correct in noting that Mr. Adams' acts of misconduct occurred prior to the time he received his designation, the language in paragraph 31(c) of FAA Order 8710.3A does not require, as a prerequisite to this action, that the offending conduct take place during the time the individual was possessed of the designation. Rather, the provision states

"[a]ny action(s) by the examiner which may reflect discredit upon the FAA . . . " can provide the grounds for cancelling a designation. I would also refer you to 14 CFR § 183.15(d)(6), which provides that a designation can be terminated "[f]or any reason the Administrator deems appropriate."

In your October 31 letter, you also address FAA Order 8700.1, which pertains to the agency's procedures for handling the nonrenewal of pilot examiner designations. Under these procedures, the initial renewal/nonrenewal decision ordinarily rests at the field office level (i.e., the FSDO), with an opportunity to refer that decision to the Regional Flight Standards Division Manager for final administrative review. You are correct in noting that the procedure utilized with respect to Mr. Adams' differed slightly from this procedure, in that the initial nonrenewal determination was bumped-up from the FSDO level to the Regional Flight Standards Division Manager (i.e., Mr. Merriman), with the reviewing body similarly bumped-up one level, from the Division Manager (Mr. Merriman) to myself. The Scottsdale FSDO was removed from this decisionmaking process, upon the advise [sic] of counsel, because the ultimate decision in this matter would necessarily involve a determination as to the propriety of the FSDO's actions in initially issuing Mr. Adams his pilot examiner designation. Furthermore, I am at a loss to see how this slight modification in our internal procedures has resulted in any unfair prejudice to your client.

For the foregoing reasons, I can find no basis upon which to overturn the decision that Mr. Adams' pilot examiner designation should not be renewed. Should you wish to

contest this decision, your legal remedy is to file a petition for review in the United States Court of Appeals within 60 days of the date of mailing of this final decision.

Finally, in passing, I noted that in your most recent letter to me of December 16, 1991, you claimed that the decision taken as to Mr. Adams' designation has caused him "severe economic hardship." Once again, I am at a loss to understand the claimed extent of such hardship. While designated examiners may charge "reasonable fees" for their time (FAA Order 8710.3A, paragraph 6a), such designations are not intended by the FAA to be the source of the examiner's livelihood, as they are issued only to experienced pilots who are already employed as flight instructors or in another type of piloting service (FAA Order 8700.3A, paragraphs 13 and 14).

Sincerely,

/s/ Thomas C. Accardi
Thomas C. Accardi
Director, Flight Standards Service

APPENDIX C

THOMAS L. TOONE
BEER, TOONE & RYAN, P.C.
76 East Mitchell
Phoenix, Arizona 85012
(602) 263-0900

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
IN AND FOR THE NINTH CIRCUIT

ALFRED M. ADAMS, Petitioner, vs. BARRY LAMBERT HARRIS, Administrator, Federal Aviation Administration, Respondent.	**92-70089** **PETITION FOR REVIEW** (Filed Feb. 13, 1992)

COMES NOW the petitioner, Alfred M. Adams, by and through his attorneys, Beer, Toone & Ryan, P.C., and, pursuant to 49 USCS Appx. § 1486, hereby petitions the court for review of the Order of the Federal Aviation Administration dated January 27, 1992, which Order contained a decision not to renew the petitioner's Pilot Examiner Designation. A full and complete copy of the Order is attached hereto as Exhibit A.[1]

[1] See Appendix B to this Petition.

Petitioner respectfully requires that the Order be set aside and that the Federal Aviation Administration be ordered to renew petitioner's Pilot Examiner Designation.

. . .

DATED this 11th day of February, 1992.

BEER, TOONE & RYAN, P.C.

By /s/ Thomas L. Toone
Thomas L. Toone
76 East Mitchell
Phoenix, AZ 85012
Attorneys for Petitioner

COPIES of the foregoing
mailed this 11th day
of February, 1992 to:

Barry Lambert Harris, Administrator
c/o Mr. Thomas C. Accardi
Director, Flight Standards Service
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 30591

DeWitte L. Lawson, Jr., Esq.
Federal Aviation Administration
Western Pacific Region
P.O. Box 92007
Worldway Postal Center
Los Angeles, CA 90009

/s/ Thomas L. Toone